



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/806,775	07/09/2001	Markku Rajala	0386/00294	5959
7590 02/13/2006			EXAMINER	
Burton A Amernick Connolly Bove Lodge & Hutz PO Box 19088 Washington, DC 20036-0088			HOFFMANN, JOHN M	
			ART UNIT	PAPER NUMBER
			1731	

DATE MAILED: 02/13/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/806,775

Applicant(s)

RAJALA ET AL.

Examiner

John Hoffmann

Art Unit

1731

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 25 October 2005.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 37-52 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 37-52 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 25 October 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 51-52 and 44-45 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claim 51 calls for the nozzle comprising various tubes. There is no support for this. As pointed out previously, the specification refers to feature 8 as being the nozzle and in the drawing 8 points to the burner face. Furthermore, page 4, lines 4-5 "...at the right end of the flame spray gun 1, seen in Fig.1, there is a nozzle 8" and page 4, lines 21-22, " The liquid component...is brought to the flame spray gun 1 along the liquid duct 6." The nozzle cannot comprise the tubes as indicated in claim 51, because the tubes are not at the right end of gun 1, rather, they run the entire length of the gun.

The same applies to claim 44 which require the tubes be part of the nozzle.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 44- 45 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 44: lines 2-3 requires that the nozzle has tubes (i.e. at least 2). Lines 6 and 9 refer to two different tubes – it is unclear whether they are in addition to the tubes of line 3 (i.e. for a total of 4). In other words, there is confusing antecedent basis for the tubes.

Claim Rejections - 35 USC § 103

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

Art Unit: 1731

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148

USPQ 459 (1966), that are applied for establishing a background for determining

obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

Claims 37, 38 and 41 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hawtof 6565823 in view of Takahashi 4388098.

Hawtof discloses everything of claim 1, except for the liquid solution. See figure 1 and 4 (and the associated text). It unambiguously discloses supplying a fuel gas (methane) through a nozzle (40) to produce a flame 23. As per col. 7, lines 31-44, there a liquid and a "small portion" of vapor. The small portion is deemed to be the first glass component and the liquid is the second glass component. The second glass component contains a rare earth metal (see claim 2 and from col. 8, line 63 to col. 9, line 10 of Hawtof); as indicated above, there is no teaching that it is a solution. As to the step of introducing an atomizing gas: Hawtof col. 8, lines 40-45.

Hawtof also does not disclose first and second particles which combine with each other to form multicomponent glass particles. It is noted from page 5, lines 6-17 of the present application that it is "unclear" to applicant what actually happens. In as much

Art Unit: 1731

as that passage states that applicant states that it can be “assumed” as to what happens, it is deemed that one can likewise assume the same thing would happen in Hawtof because Hawtof also has a vapor and liquid. Although Examiner is not an expert in flame science/experimentation, to Examiner it might be impossible for one to be able to determine whether two different types of particles are actually created in a flame as a precursor to the multi-component glass particles. Alternatively, it would seem possible that a potential competitor could substantially copy the present invention, and necessarily avoid infringement because one could not prove (at best one could only ‘assume’) whether the first and second particles were created or whether the oxides condensed equally to all particles.

Hawtof does not disclose much of anything about the dopant precursors. Takahashi discloses that there are difficulties (col. 1, lines 27- 53) when adding dopants. Takahashi discloses the solution to the problem - that nebulized solutions of the metal salts is “quite simple” and ensures fibers with low loss (col. 1, lines 67). It is noted that Takahashi’s lanthanum oxide is a rare earth metal oxide. It would have been obvious to provide the Hawtof rare earth dopant by using a solution of a lanthanum salt because such is quite simple and it ensures a fiber with low loss.

Claims 38, and 41 are clearly met.

Claims 39-40 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hawtof 6565823 in view of Takahashi 4388098 as applied to claims **22 and 36**, and further in view of Ainslie 4923279.

Hawtof does not teach the specific elements erbium and aluminum.

Ainslie teaches that erbium is one of the two "most important" rare earths and that one can make oscillators, lasing devices and amplifiers; and that aluminum eliminates losses of dopants (col. 1, lines 13-26 and 48-53 col. 3, lines 19-25 and col. 2, lines 40-45. It would have been obvious to use erbium as the Hawtof rare earth because it is most important and so as to make oscillators, amplifiers and lasing devices. And further obvious to use aluminum dopant (by adding an aluminum salt solution) so as to prevent the loss of dopants.

Claims 37-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Randall 3883336 in view of Hawtof 6565823, Ainslie 4923279, and Takahashi 4388098.

See the prior Office action for the manner in which the art is applied.

Claims 46-52 are rejected under 35 U.S.C. 103(a) as being unpatentable over Randall 3883336 in view of Hawtof 6565823, Ainslie 4923279, Takahashi 4388098 and Finnish patent 98832.

Claims 46-52 are substantially the same as the claims above, however claims 46-52 require that the fuel gas be used to cause the atomizing – which is not taught by the other references. From the last two full sentences of page 5 of the English language translation of the Finnish patent: fuel gas is used to atomize the liquid so as to produce small particles quickly, inexpensively and in one phase. It would have been

obvious to use a fuel gas for the Hawtof atomizing, so as to make the particles quickly, inexpensively and in one phase.

Alternatively and/or additionally, the bottom of page 9 and elsewhere of the Finnish patent indicate that the flow of gases through the burner is a result-effective variable. It would have been obvious to perform routine experimentation to determine the optimal material-feed arrangement depending upon the desired final product.

From MPEP 2144.04

C. Changes in Sequence of Adding Ingredients

Ex parte Rubin , 128 USPQ 440 (Bd. App. 1959) (Prior art reference disclosing a process of making a laminated sheet wherein a base sheet is first coated with a metallic film and thereafter impregnated with a thermosetting material was held to render prima facie obvious claims directed to a process of making a laminated sheet by reversing the order of the prior art process steps.). See also In re Burhans, 154 F.2d 690, 69 USPQ 330 (CCPA 1946) (selection of any order of performing process steps is prima facie obvious in the absence of new or unexpected results); In re Gibson, 39 F.2d 975, 5 USPQ 230 (CCPA 1930) (Selection of any order of mixing ingredients is prima facie obvious.).

Response to Arguments

Applicant's arguments filed 25 October 2005 have been fully considered but they are not persuasive.

It is argued that Hawtof suggests (at ??? col 7, lines 42-44, perhaps) that it is generally undesirable to introduce vaporous reactant. Examiner could find no such suggestion. The plain reading of Hawtof is that a portion of the reactant can be vapor form without adversely affecting the invention (col. 7, lines 42-44). Even if there is some portion of Hawtof that teaches of undesireability, when weighed against the

Art Unit: 1731

passage of col. 7, line 42-44, such a suggestion would not overcome the propriety of the combination.

From MPEP 2145:

A prior art reference that "teaches away" from the claimed invention is a significant factor to be considered in determining obviousness; however, "the nature of the teaching is highly relevant and must be weighed in substance. A known or obvious composition does not become patentable simply because it has been described as somewhat inferior to some other product for the same use." In re Gurley, 27 F.3d 551, 554, 31 USPQ2d 1130, 1132 (Fed. Cir. 1994) (Claims were directed to an epoxy resin based printed circuit material. A prior art reference disclosed a polyester-imide resin based printed circuit material, and taught that although epoxy resin based materials have acceptable stability and some degree of flexibility, they are inferior to polyester-imide resin based materials. The court held the claims would have been obvious over the prior art because the reference taught epoxy resin based material was useful for applicant's purpose, applicant did not distinguish the claimed epoxy from the prior art epoxy, and applicant asserted no discovery beyond what was known to the art.)

Hawtof's teaching is that vaporous ingredients might be somewhat inferior. As indicated above, Applicant cannot get a patent merely because Hawtof indicates it is somewhat inferior. Hawtof had full concept of that aspect of Applicant's invention.

It is further argued that page 6 of Takahashi teaches low velocity sprays. Neither page 6 nor col. 6 of Takahashi discloses anything about spray velocities. Flow rates and flow velocities are related but not identical or interchangeable (one is distance/ unit time and the other is volume per unit time. Moreover, even if there were differences between the Hawtof and Takahashi velocities (or flow rates) – examiner doubts any patent should be granted on velocity of the sprays. Applicant's unsupported assertion of uncombinability is not persuasive: no evidence or rationale is supplied to support the assertion of "considerable doubt".

Applicant is reminded that from MPEP 2145:

III. ARGUING THAT PRIOR ART DEVICES ARE NOT PHYSICALLY COMBINABLE

"The test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference.... Rather, the test is what the combined teachings of those references would have suggested to those of ordinary skill in the art." In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). See also In re Sneed, 710 F.2d 1544, 1550, 218 USPQ 385, 389 (Fed. Cir. 1983) ("[I]t is not necessary that the inventions of the references be physically combinable to render obvious the invention under review."); and In re Nievelt, 482 F.2d 965, 179 USPQ 224, 226 (CCPA 1973) ("Combining the teachings of references does not involve an ability to combine their specific structures.").

In other words: it is not necessary that the flow rates/velocities of the references be physically combinable in a particular embodiment to render obvious the invention.

It is argued that figures 1 and 2, show that nozzle 8 is a single piece comprising several tubes. This is not convincing, because the application must be considered as a whole. Applicant focuses on the drawing but ignores the specification. As pointed out above: *page 4, lines 4-5 "...at the right end of the flame spray gun 1, seen in Fig.1, there is a nozzle 8"* and *page 4, lines 21-22, "The liquid component...is brought to the flame spray gun 1 along the liquid duct 6."* The nozzle does cannot comprise the tubes as indicated in claim 51, because the tubes are not at the right end of gun 1, rather, they run the entire length of the gun. Therefore, a reading of the entire specification readily indicates that Applicant's interpretation of the drawings (in a vacuum) is not reasonable.

It is also argued that Randall does not disclose that all of the materials are fed through the same nozzle. As indicated in the prior Office action, applicant has used the

term “nozzle” in a manner that reads on two different structures. Moreover, it would have been obvious to combine both feeding conduits into a single burner as disclosed in the other references and discussed in the rejection.

In response to applicant's argument that Ainslie is entirely different, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, it is reasonably pertinent to the same problem that applicant was concerned: incorporating rare earth elements in glass fibers.

In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Thus it does not matter that Takahashi does not teach nebulizing in the vicinity of the claims: at least Hawtof provides the requisite teaching.

The Declaration under 37 CFR 1.132 filed 25 October is insufficient to overcome the rejection of claims 37-44 because:

Art Unit: 1731

It refer(s) only to the system described in the above referenced application and not to the individual claims of the application. Thus, there is no showing that the objective evidence of nonobviousness is commensurate in scope with the claims. See MPEP § 716.

AND because

There is no indication as to what the relevance is of the benefits discussed in the declaration.

"[A]ppellants have the burden of explaining the data in any declaration they proffer as evidence of non-obviousness." Ex parte Ishizaka, 24 USPQ2d 1621, 1624 (Bd. Pat. App. & Inter. 1992). Examiner's best guess is that applicant is arguing for new and unexpected results. The declaration is would not be persuasive because there is no showing that the benefits were truly unexpected.

716.02(b) [R-2] Burden on Applicant

I. >< BURDEN ON APPLICANT TO ESTABLISH RESULTS ARE UNEXPECTED AND SIGNIFICANT

The evidence relied *>upon< should establish "that the differences in results are in fact unexpected and unobvious and of both statistical and practical significance." Ex parte Gelles, 22 USPQ2d 1318, 1319 (Bd. Pat. App. & Inter. 1992) (Mere conclusions in appellants' brief that the claimed polymer had an unexpectedly increased impact strength "are not entitled to the weight of conclusions accompanying the evidence, either in the specification or in a declaration."); Ex parte C, 27 USPQ2d 1492 (Bd. Pat. App. & Inter. 1992) (Applicant alleged unexpected results with regard to the claimed soybean plant, however there was no basis for judging the practical significance of data with regard to maturity date, flowering date, flower color, or height of the plant.). See also In re Nolan, 553 F.2d 1261, 1267, 193 USPQ 641, 645 (CCPA 1977) and In re Eli Lilly, 902 F.2d 943, 14 USPQ2d 1741 (Fed. Cir. 1990) as discussed in MPEP § 716.02(c).

Art Unit: 1731

AND

Because the declaration makes no comparison with the closest prior art. Just because the Corning patent was made by OVD is not suggestive that was remotely close to applicant's invention.

An affidavit or declaration under 37 CFR 1.132 must compare the claimed subject matter with the closest prior art to be effective to rebut a prima facie case of obviousness. In re Burckel, 592 F.2d 1175, 201 USPQ 67 (CCPA 1979). "A comparison of the claimed invention with the disclosure of each cited reference to determine the number of claim limitations in common with each reference, bearing in mind the relative importance of particular limitations, will usually yield the closest single prior art reference." In re Merchant, 575 F.2d 865, 868, 197 USPQ 785, 787 (CCPA 1978) (emphasis in original). Where the comparison is not identical with the reference disclosure, deviations therefrom should be explained, In re Finley, 174 F.2d 130, 81 USPQ 383 (CCPA 1949), and if not explained should be noted and evaluated, and if significant, explanation should be required. In re Armstrong, 280 F.2d 132, 126 USPQ 281 (CCPA 1960) (deviations from example were inconsequential).

AND

Relevant commercial success has not been adequately shown.

In considering evidence of commercial success, care should be taken to determine that the commercial success alleged is directly derived from the invention claimed, in a marketplace where the consumer is free to choose on the basis of objective principles, and that such success is not the result of heavy promotion or advertising, shift in advertising, consumption by purchasers normally tied to applicant or assignee, or other business events extraneous to the merits of the claimed invention, etc. In re Mageli, 470 F.2d 1380, 176 USPQ 305 (CCPA 1973) (conclusory statements or opinions that increased sales were due to the merits of the invention are entitled to little weight); In re Noznick, 478 F.2d 1260, 178 USPQ 43 (CCPA 1973).

In ex parte proceedings before the Patent and Trademark Office, an applicant must show that the claimed features were responsible for the commercial success of an article if the evidence of nonobviousness is to be accorded substantial weight. See In re Huang, 100 F.3d 135, 140, 40 USPQ2d 1685, 1690 (Fed. Cir. 1996) (Inventor's opinion as to the purchaser's reason for buying the product is insufficient to demonstrate a nexus

Art Unit: 1731

between the sales and the claimed invention.). Merely showing that there was commercial success of an article which embodied the invention is not sufficient. Ex parte Remark, 15 USPQ2d 1498, 1502-02 (Bd. Pat. App. & Inter. 1990). Compare Demaco Corp. v. F. Von Langsdorff Licensing Ltd., 851 F.2d 1387, 7 USPQ2d 1222 (Fed. Cir. 1988) (In civil litigation, a patentee does not have to prove that the commercial success is not due to other factors. "A requirement for proof of the negative of all imaginable contributing factors would be unfairly burdensome, and contrary to the ordinary rules of evidence.").

See also Pentec, Inc. v. Graphic Controls Corp., 776 F.2d 309, 227 USPQ 766 (Fed. Cir. 1985) (commercial success may have been attributable to extensive advertising and position as a market leader before the introduction of the patented product); In re Fielder, 471 F.2d 690, 176 USPQ 300 (CCPA 1973) (success of invention could be due to recent changes in related technology or consumer demand; here success of claimed voting ballot could be due to the contemporary drive toward greater use of automated data processing techniques); EWP Corp. v. Reliance Universal, Inc., 755 F.2d 898, 225 USPQ 20 (Fed. Cir. 1985) (evidence of licensing is a secondary consideration which must be carefully appraised as to its evidentiary value because licensing programs may succeed for reasons unrelated to the unobviousness of the product or process, e.g., license is mutually beneficial or less expensive than defending infringement suits); Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 231 USPQ 81 (Fed. Cir. 1986) (Evidence of commercial success supported a conclusion of nonobviousness of claims to an immunometric "sandwich" assay with monoclonal antibodies. Patentee's assays became a market leader with 25% of the market within a few years. Evidence of advertising did not show absence of a nexus between commercial success and the merits of the claimed invention because spending 25-35% of sales on marketing was not inordinate (mature companies spent 17-32% of sales in this market), and advertising served primarily to make industry aware of the product because this is not kind of merchandise that can be sold by advertising hyperbole.).

II. >< COMMERCIAL SUCCESS MUST FLOW FROM THE FUNCTIONS AND ADVANTAGES DISCLOSED OR INHERENT IN THE SPECIFICATION DESCRIPTION

To be pertinent to the issue of nonobviousness, the commercial success of devices falling within the claims of the patent must flow from the functions and advantages disclosed or inherent in the description in the specification. Furthermore, the success of an embodiment within the claims may not be attributable to improvements or modifications made by others. In re Vamco Machine & Tool, Inc., 752 F.2d 1564, 224 USPQ 617 (Fed. Cir. 1985).

III. >< IN DESIGN CASES, ESTABLISHMENT OF NEXUS IS ESPECIALLY DIFFICULT

Establishing a nexus between commercial success and the claimed invention is especially difficult in design cases. Evidence of commercial success must be clearly attributable to the design to be of probative value, and not to brand name recognition, improved performance, or some other factor. Litton Systems, Inc. v. Whirlpool Corp., 728 F.2d 1423, 221 USPQ 97 (Fed. Cir. 1984) (showing of commercial success was not accompanied by evidence attributing commercial success of Litton microwave oven to the design thereof).

IV. >< SALES FIGURES MUST BE ADEQUATELY DEFINED

Gross sales figures do not show commercial success absent evidence as to market share, Cable Electric Products, Inc. v. Genmark, Inc., 770 F.2d 1015, 226 USPQ 881 (Fed. Cir. 1985), or as to the time period during which the product was sold, or as to what sales would normally be expected in the market, Ex parte Standish, 10 USPQ2d 1454 (Bd. Pat. App. & Inter. 1988)

Presently, the declaration refers to 26 deliveries, 17 customers and 9 repeat orders. There is no evidence as to market share, or what sales would normally be expected in the market. There is no evidence that any success was derived from the functions and advantages, and not attributed to improvements by others. Further there is no evidence that the success was not the result of heavy promotion or advertising, shift in advertising, consumption by purchasers normally tied to applicant or assignee, or other business events extraneous to the merits of the claimed invention.

In view of the foregoing, when all of the evidence is considered, the totality of the rebuttal evidence of nonobviousness fails to outweigh the evidence of obviousness.

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

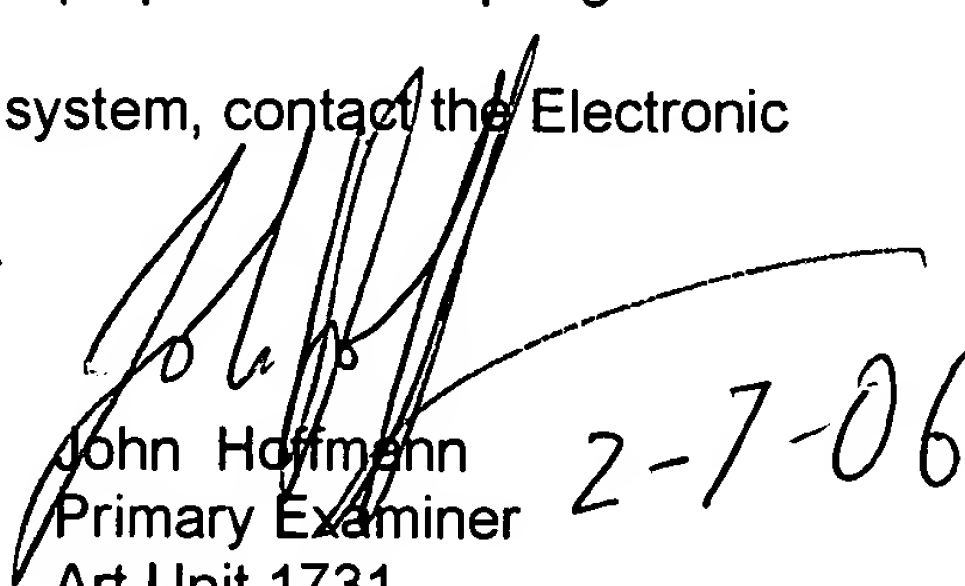
A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within

TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to John Hoffmann whose telephone number is (571) 272 1191. The examiner can normally be reached on Monday through Friday, 7:00- 3:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Steve Griffin can be reached on 571-272-1189. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


John Hoffmann
Primary Examiner
Art Unit 1731

2-7-06